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Issue Date: 28 January 2004

DERRICK BLACK
Claimant

2003-LHC-00537
OWCP No. 06-179203

v.

SOUTHERN LABOR SERVICES
Employer

and

AMERICAN LONGSHORE MUTUAL ASSOCIATION
Carrier

ORDER

GRANTING EMPLOYER/CARRIER'S MOTION FOR SUMMARY DECISION

This case involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 933, et. seq. (the "Act") and the regulations promulgated thereunder. Although this case was set for hearing on November 19, 2003, the parties ultimately decided to proceed "on the record" without necessity of oral testimony. Claimant is represented by David Barnett, Esquire, Barnett & Lerner, P.A., Dania Beach, Florida. The Employer/Carrier is represented by Lisa-Torron Bautista, Esquire, Conroy, Simberg, Ganon, Krevans & Abel, P.A, Orlando, Florida. While the Employer/Carrier is often referred to as one entity in Longshore matters, I note that the Employer in this case, Southern Labor Services ("SLS"), was insured by American Longshore Mutual Association ("ALMA"), a branch of F.A. Richard & Associates ("FARA"). Concurrent with his Longshore matter, Claimant was involved in a third party action against several defendants. At issue is a third party action, which has become inextricably linked to the Longshore claim, wherein Claimant was represented by Lawrence Bohannon, Esquire, Fort Lauderdale, Florida. Florida Transportation Services ("FTS") was also one of the named defendants in the third party action. FTS was represented by James Perry II, Esquire, Blanck & Perry, P.A., Miami, Florida. Significantly, FTS, like SLS, was insured by FARA.

This case was initially set for hearing on July 16, 2003 in Miami, Florida. On or about July 1, 2003, a Joint Motion for Continuance was filed because the focus of the case had shifted from the issue of past indemnity benefits to a defense arising under Section 33(g) of the Act, which the Employer/Carrier sought to raise. This was denied, but I scheduled a status conference on the date of hearing. I was later advised that the subject matter of the formal hearing had been resolved and that the parties requested a remand. On July 16, 2003, the status conference was held. At that time I was advised that the outstanding issue was the lien under Section 33(g). Since the matter involved a new issue and because the parties told me that they would attempt to resolve the matter, I granted a continuance. On August 18, 2003, I issued an

Order Continuing the Case and Resetting the Hearing. It was reset for November 19, 2003 in Fort Lauderdale, Florida.

In September, 2003, three motions were filed: (1) a Motion to Compel the Employee/Claimant to Attend Deposition; (2) a Motion to Dismiss based on Claimant's failure to attend his previously scheduled deposition; and (3) a Joint Motion to Continue the Formal Hearing. On October 20, 2003, a telephonic hearing was held to discuss the status of the case and these outstanding motions. The Motion to compel was granted but the motion to dismiss was not.

On or about November 5, 2003, Employer/Carrier filed a Motion for Summary Judgment pursuant to Rule 56, Federal Rules of Civil Procedure. Employer/Carrier argued that it was entitled to summary judgment because Claimant did not, as required by 33 USCS § 933(g)(2), obtain written approval from the Employer/Carrier before entering into a Release of all Claims with third-party defendant, Florida Transportation Services. The following was alleged:

1. The Claimant, Mr. Derrick Black, hereinafter, the "Claimant," had a compensable accident on February 10, 1999, injuring his right knee under the Longshore and Harbor Workers' Compensation Act, 33 USCS § 901 et seq, hereinafter, the "Act."

2. As part of his claim, the Claimant filed an LS-203 with the Department of Labor for benefits under the Act.

3. Subsequently, the Claimant filed an LS-18 on 10/10/02 for indemnity and medical benefits.

4. The Claimant also filed a third-party action seeking damages against, Florida Transportation Services, Inc., Southern Star Shipping Company, Inc., Atlantic Bulk Carrier's LTD, and Plymouth Shipping Limited. (See Exhibit A - Complaint).

5. The Employer/Carrier filed their Notice ot Lien on 11/17/00. (See Exhibit B - Notice of Lien).

6. The Employer/Carrier placed the claimant, via his counsel, on notice of 33g and requirement of written approval to be obtained from Employer/Carrier on any third party settlements (See Exhibit C - Letter to Larry Bohannon dated 9/28/00).

7. The Claimant attended a private mediation on 10/2/02 in the third-party case where negotiations were discussed; however, the case was not settled with any of the respective parties at that time.

8. At the time following the third party mediation, the Attorney for the Claimant's third-party claim was trying to settle the Longshore matter with the Employer/Carrier. Mr. Bohannon was advised that the claimant had representation for his Longshore claim and that the Employer/Carrier was unable to negotiate an 8i settlement with him directly. In addition, the Employer/Carrier once again advised Mr. Bohannon that he was not to settle any or all of the third party claims without approval of the Employer/Carrier.

9. The Claimant entered into a Release of All Claims with Florida Transportation Services on March 6, 2003, for gross amount of $60,000 . The Release of all Claims states on lines 9 and 10 that the gross amount includes Workers Compensation claims, LHWCA liens . . . (See Exhibit D - Release of all Claims).

10. Pursuant to the closing statement the Claimant's net amount after fees and costs was $15,179.05. (Closing statement is attached as a sealed exhibit to the Claimant's deposition taken on 9/3/03).

11. Neither the Claimant personally nor through his third-party attorney received written approval by the Employer/Carrier for the settlement agreement with Florida Transportation Services, Inc.

12. The value of the Longshore workers' compensation lien is more than the $15,179.05 net amount the Claimant received from his third-party settlement with Florida Transportation Services, Inc. (See Exhibit E -Payout Sheets). The Employer/Carrier has paid $66,94.68 in indemnity alone.

13. The Claimant testified at deposition that he has not received any other settlement monies in relation to the other defendants in the third party case, respectively.

14. The Claimant entered into a Stipulation for Dismissal with Florida Transportation Services on March 12, 2003. (See Exhibit F - Stipulation for Dismissal). An Order of Dismissal was entered by Circuit Court Judge llona Holmes on March 17, 2003. (See Exhibit G - Order of Dismissal). OWCP Case Number: 2003-LHC-00537.

15. Upon learning that the Claimant had entered into a Release of all Claims and an Order of Dismissal was entered, the Employer/Carrier filed an LS-208 to reflect a suspension of benefits. (See Exhibit H - LS-208).

16. Section 33 (g) (2) of the Act provides, in part, that if the Claimant does not receive written approval of the third party settlement that all rights to medical benefits and compensation under the Act shall be terminated.

17. There is no issue of fact in dispute regarding the above dates and chronology. The Claimant did not obtain written approval from the Employer/Carrier prior to entering into the Release of Claims and receiving his net settlement amount of $15,179.05. As such, the Employer/Carrier maintains that the claimant has forfeited all future benefits under the Act, per 33 USCS § 933 (g) (2).

13. Wherefore, there are no genuine issues of material facts in dispute and the Employer/Carrier respectfully requests that this Court grant this Motion for Summary Judgment.

By correspondence dated November 14, 2003, Employer/Carrier stated that the formal hearing scheduled for November 19, 2003, would not be forthcoming as the parties had decided to proceed with ruling on disposition of the case through brief. In addition, the deposition testimony of the Claimant taken October 22, 2003, was submitted. On or about December 12, 2003, Claimant filed a timely Response to the Employer/Carrier's Motion for Summary Judgment, a Closing Argument Brief, and the deposition of Lydia Corbin taken October 22, 2003. In that Brief, the Claimant does not dispute the facts offered by the Employer and does not dispute that I should consider this matter "on the record". However, the Claimant argues that I should apply certain equitable principles in rendering a decision.

Summary Judgment Standard

The Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges, found at Title 29 C.F.R. Part 18, provide that an administrative law judge may enter summary decision for either party if the pleadings, affidavits, material obtained by discovery, or other materials show that there is no genuine issue of material fact. Title 29 C.F.R. Section 18.40; Federal Rule of Civil Procedure 56(c). Summary judgment is appropriate when the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). No genuine issue

of material fact exists when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." ***Matsushita Elec. Indus. Co. v. Zenith Radio Corp***., 475 U.S. 574, 587 (1986). The party moving for summary judgment has the burden of establishing the "absence of evidence to support the nonmoving party's case." ***Celotex Corp. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)***. In reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party. ***Darrah v. City of Oak Park***, 255 F.3d 301, 305 (6th Cir. 2001). If the slightest doubt remains as to the facts, the ALJ must deny the motion for summary decision." ***Stauffer v. Wal-Mart Stores, Inc***., USDOL/OALJ Reporter (HTML), ARB No. 99-107, OALJ No. 1999-STA-21 at 6 (ARB November 30, 1999), citing ***Anderson v. Liberty Lobby, Inc***., 477 U.S. 242, 249 (1985).

Issues

(1) Does Claimant's failure to obtain written approval from Employer/Carrier prior to entering into a Release of all Claims with third-party defendant terminate Claimant's right to compensation from Employer/Carrier pursuant to Section 33(g) of the Act?
(2) Do the actions taken by Employer/Carrier post settlement function as an implied waiver of its right to terminate benefits pursuant to Section 33(g)?

Rendition of Facts

A review of the record reveals the following facts:

Claimant was involved in a compensable accident under the Act on February 10, 1999. (*See* Claimant's Brief at 1; Employer's Brief at 1). On October 12, 2002, Claimant filed an LS-18 for indemnity and medical benefits. (*See* Employer's Brief at 1). The Employer/Carrier thereafter initiated temporary indemnity benefits which were eventually terminated on or about January 2002. (See Claimant's Brief). Medical benefits were also provided. Prior to the termination of compensation benefits, the Claimant filed a cause of action in Circuit Court against multiple defendants in a third party action. (*See* Claimant's Brief at 2; Employer's Brief at 1). Those defendants included Florida Transportation Services, Inc., Southern Style Shipping Company, Inc., Atlantic Bulk Carriers, Ltd, and Plymouth Shipping Limited. (*See* Claimant's Brief at 2; EX A). Claimant was represented by Lawrence Bohannon during the pendency of those claims. (*See* Claimant's Brief at 2).

Correspondence dated September 28, 2000, demonstrates that Ms. Torron-Bautista, counsel for the Employer/Carrier, advised Mr. Bohannon that she had been aware of Claimant's intent to pursue a third party action and that the Employer/Carrier claimed a lien on any recovery from the accident. (EX C). In the correspondence, she also stated that "[i]f suit is filed, Section 33(g) requires that notice of said suit shall be served upon the compensation carrier so that a notice of lien may be filed." (EX C). Ms. Torron-Bautista further stated that, "[s]hould a settlement be negotiated without the necessity of filing suit, please advise us so that we may discuss the settlement of the lien." (EX C). The Employer/Carrier filed their Notice of Lien on November 17, 2000. (EX B). According to the Employer/Carrier, Claimant attended a private mediation on October 2, 2002, in his third party claim at which time negotiations were discussed but no settlement was reached with any of the parties. (Employer's Brief at 2:7). On November 20, 2002, Claimant's Longshore claim was referred to the Office of Administrative Law Judges for a formal hearing.

On February 4, 2003, another mediation conference was held regarding the possibility of settling the third party claim. Although Clara Aranda was in attendance on behalf of the

workers' compensation carrier, Ms. Torron-Bautista was not in attendance. (Deposition of Derrick Black, October 22, 2003, at 25:5). No settlement was reached at the conference. (Deposition of Derrick Black, October 22, 2003, at 25:5). That same day, Mr. Bohannon sent correspondence to Mr. Perry regarding a settlement. Ms. Torron-Bautista, counsel for Employer/Carrier, was copied on the letter. Mr. Bohannon's letter specifically stated that Claimant had agreed to accept FTS's offer of settlement for $60,000, subject to approval by worker's compensation. (CX 2). It further stated that worker's compensation had made an offer which included waiver of their lien and that Claimant had accepted this offer. (CX 2). The correspondence also provided that claims against other Defendants were still being pursued and that none of the settlement documents were in any way to prejudice Claimant's claims against Southern Star Shipping, Plymouth Shipping, and Atlantic Bulk Carriers. (CX 2).

Approximately one week later, on or about February 10, 2003, Mr. Bohannon sent ALMA a letter requesting that the enclosed "Approval of Compromise of Third Person Cause of Action" be signed and returned. (CX 2). Ms. Torron-Bautista was copied on the letter. The next day, February 11, 2003, Ms. Torron-Bautista sent correspondence to Mr. Barnett indicating that she had received Mr. Bohannon's letter in which he stated that Claimant had accepted the offer from Employer/Carrier including waiver of lien. (CX 3). She explained that her authority was twenty thousand dollars ($20,000) in "new" money to Claimant in a proposed 8(i) settlement that would be given with waiver of the lien. Moreover, she stated that she had explained to Mr. Bohannon that she would not settle with him or provide written approval for the settlement of sixty thousand dollars ($60,000) with FTS unless Mr. Barnett accepted the above settlement offer. (CX 3). She also claimed to have explained to Mr. Bohannon that she would not resolve the matter with him in terms of an 8i agreement; rather, it was Mr. Barnett who represented Claimant in such capacity. Accordingly, she requested that Mr. Barnett contact Mr. Bohannon and inform her whether the case would be settled under an 8i agreement for $20,000 plus waiver of the lien. (CX 3). Finally, she stated that by copy of the letter she was advising Mr. Bohannon that there was no agreement and that Employer/Carrier had not provided written approval for the settlement with FTS. (CX 3).

On March 6, 2003, Claimant executed a Release of All Claims regarding FTS. (EX 2). Also on March 6, 2003, a Stipulation for Dismissal was entered into between Mr. Bohannon and Mr. Perry. (CX 4). On March 17, 2003, Judge Holmes issued an Order of Dismissal. (CX 5/EX 3). Ms. Torron-Bautista testified that she only became privy to the Order because "her name was on it." (Telephonic Hearing, July 16, 2003). On or about March 27, 2003, Ms. Torron-Bautista sent correspondence to Mr. Barnett confirming that Claimant had entered into a Settlement Release Agreement with one of the third party defendants for $60,000. She also stated that "written approval was not provided by the Employer/Carrier for that settlement" and that in this regard she had written "various letters to Larry Bohannon." Further, she noted that "at this point it is the Employer/Carrier's position that all benefits under the Act are terminated as of 3/6/03."

On April 24, 2003, Employer/Carrier authorized Dr. Berkowitz to provide medical treatment to Claimant. (*See* Claimant's Brief at 4). Thereafter, on April 29, 2003, Employer/Carrier filed an LS-207, terminating the Claimant's right to benefits retroactively on the basis that he entered into a settlement of the third party action without their written consent. (*See* Claimant's Brief at 4). On May 19, 2003, Employer/Carrier issued a check to Claimant for over $20,000, which Employer/Carrier advised represented the indemnity benefits owed from termination of those benefits in 2002 through Claimant's entry into a lump sum settlement on the third party action in March, 2003. (See Claimant's Brief at 4). Immediately thereafter,

correspondence was directed to the Employer/Carrier acknowledging receipt of over $20,000. In the correspondence, Claimant offered to forward back to the Employer/Carrier Claimant's net settlement proceeds from the third party action, which, based upon the closing statement, amounted to $15,179.05. (*See* Claimant's Brief at 4). However, based upon Employer/Carrier's termination of benefits pursuant to the LS-207, retroactive to March 2003, Claimant would use the $15,179.05 as a dollar for dollar credit against future compensation due from March 2003 onward. (*See* Claimant Brief at 4-5). Based upon the Claimant's calculation, the credit would have terminated effective November, 2003. (*See* Claimant's Brief at 5).

Applicable Standards

Written Approval Requirement Under 33 USCS § 933(g)(2)

> Section 33(g) of the LHWCA provides in pertinent part:
> (g)(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) would be entitled under the Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.
> (g)(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act.

Before determining whether Claimant has failed to comply with the written approval requirement of § 33(g), it is necessary to establish whether Claimant qualifies as a "person entitled to compensation" under the Act. The Employer/Carrier has stipulated that Claimant qualifies as such. (Employer's Brief at 5). In ***Estate of Cowart v. Nicklos Drilling Co.***, 505 U.S. 469 (1992), the Court instructed that that the written approval requirement of § 33(g) "protects the employer against his employee's accepting too little for his cause of action against a third party." *Id*. at 482 *citing* ***Banks v. Chicago Grain Trimmers Ass'n., Inc.***, 390 U.S. 459, 467 (1968). Stated differently, the "purpose of § 33(g) is to prevent claimants from unilaterally bargaining away funds to which the employer is entitled under 33 U.S.C. § 933(d) or (f)." ***Nesmith v. Farrell American Station***, 19 BRBS 176, 179 (1986). Based on this principle, the Board in ***Harris v. Todd Pacific Pacific Shipyards Corp.***, 28 BRBS 254 (1994), *aff'd and modified on recon. en banc*, 30 BRBS 5 (1996)(Brown and McGranery, JJ., dissenting) held that § 33(g) bars claims for compensation and medical benefits where the employee has settled with a third party for less than he would be entitled under the LHWCA, without the employer's prior written approval. In ***Esposito v. Sea-Land Service, Inc.***, 36 BRBS 10 (2002), the Board clarified that "the claimant must obtain prior written approval of a third-party settlement if the gross proceeds of the aggregate settlements are in an amount less than the compensation to which the claimant would be entitled under the Act." *See id*. at 11-12. Finally, in ***Wykneko v. Todd***

Pacific Shipyards Corp., 32 BRBS 16 (1998), the Board indicated that a claimant who fails to secure the necessary written approval from his employer forfeits not only his entitlement to *future* benefits under the Act but rather forfeits "*all* rights to compensation and medical benefits." *See id.* at 20 (emphasis added).

Employer/Carrier's Post Settlement Actions Under Section 33(g)

Longshore cases do not address the issue of whether equitable principles would operate to defeat an employer/carrier's Section 33(g) defense in cases where, notwithstanding Claimant's failure to obtain pre-settlement written approval, employer/carrier's post-settlement actions seem to demonstrate approval.

Discussion

A review of the documents furnished from the state case shows that the Employer/Carrier had filed a notice of lien and that Southern Labor Services was not included in the stipulation and consent order. The record shows that Claimant settled his third party case, without obtaining written approval from Employer/Carrier, for a gross amount of sixty thousand dollars ($60,000), which is less than the Longshore lien under the Act. Therefore, Claimant has forfeited and right to subsequent benefits due under the Act.[1]

If no written approval of the settlement is obtained and filed or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act. Section 33(g)(2). Therefore, the Claimant had a duty to provide actual notice that he intended to settle the third party case.

An employee who may have a claim for damages against a third party (other than his employer) is not required to elect between receiving compensation from his employer (who is required to pay regardless of fault) and commencing a negligence action against the third party. He may pursue both remedies. 33 U.S.C. § 933(a). However, the Claimant is responsible to ensure that the Employer/Carrier is a party to any third party settlement. If recovery is obtained from a third party, then the employer is entitled to offset its liability under the LHWCA against such recovery pursuant to 33 U.S.C. § 933(f). ***I.T.O. Corp. of Baltimore v. Sellman***, 954 F.2d 239, 241, *vacated in part, adhered to in part on reh'g, reh'g en banc denied*, 967 F.2d 971 (4th Cir. 1992), cert. denied, 507 U.S. 984 (1993); ***Speaks v. Trikora Lloyd P.T***., 838 F.2d 1436 (5th Cir. 1988); ***Chavez v. Todd Shipyards Corp***., 27 BRBS 80 (1993), see 24 BRBS 71, a*ff'd in part, rev'd in part, 9*61 F.2d 1409 (9th Cir. 1992), 25 BRBS 134 (CRT) (Employer is entitled to lien for benefits paid.).

Claimant argues that I should apply equitable principles. He asserts that prior to the resolution of the third party action, the Employer/Carrier intended to provide written notice contingent upon the Claimant resolving his Longshore claim for essentially-nuisance value. In

[1] It is worth noting that the Court in *Cowart* did establish two exceptions to the written approval requirement in which mere notification will suffice; however, neither exception applies in the instant case. The first exception applies where the employee obtains a judgment, rather than a settlement, against a third party. The second exception applies where the employee settles for an amount greater than or equal to the employer's total liability. The rationale underlying these exceptions is that the employer's rights are protected under these circumstances, and thus there is no longer the need for written approval.

so doing, the Claimant provided an evaluation, as to the value of the claim, in an effort to assist the parties in reaching a "global conclusion".

> Unfortunately, the Employer/Carrier refused and was unwilling to entertain any discussion as to the value of the Longshore worker's compensation claims, and would only consider nuisance parameters. The Employer/Carrier maintained and utilized its nuisance offer to the detriment of the Claimant. Thus, by the record of evidence, the Court is well aware that the Employer/Carrier was continually notified, as well as an active participant, during the concluding stages of the third party action. The adjuster has testified extensively of her involvement, relative to the conclusion of the third party claim, and the record evidence also provided numerous letters back and forth between the parties. The Employer/Carrier was also copied on the Stipulation for Settlement, as well as the order approving the settlement of the parties.
>
> Even after attempting to force the Claimant into settling his Longshore worker's compensation claim for nuisance value in conjunction with executing a release of the third party action, the Employer/Carrier still provided benefits thereafter. It took the Employer/Carrier approximately six (6) weeks to file an LS-207, denying the claimant's right to compensation benefits, under Section 33(g). However, even after filing the LS-207, the Employer/Carrier unilaterally made payments to the Claimant in excess of twenty-two ($22,000.00) thousand dollars, and further, initiated the authorization of ongoing medical care. Certainly, the actions of the Employer/Carrier seems to demonstrate either a waiver, or a reinstatement of the benefits which are now attempted to be denied,

See Brief. The Claimant argues that "clearly, and unequivocally", by a review of the evidence, the equitable aspects clearly demonstrate that the Employer/Carrier misapplied Section 33(g).

In ***Nesmith***, the Benefits Review Board specifically rejected the application of equitable principles in the context of the written approval requirement, holding that "the legislative history of Section 33(g) indicates that the 1972 Amendments were intended to overrule prior caselaw applying estoppel, substantial compliance and similar theories to avoid the effect of non-compliance with Section 33(g) . . ." ***Nesmith***, 19 BRBS 176 at 179. Additionally, the Board articulated that "the relevant portions of the 1972 Amendments were preserved in the 1984 Amendments, indicating Congress' clear intent to prevent claimant from relying upon these equitable principles to avoid strict compliance with the written consent requirement of the statute." *Id*.

Both parties agree that ***Nesmith*** is valid law. (See Briefs).

However, although Claimant argues that I should apply equity, he has not alleged compelling facts or circumstances that would demonstrate substantial or partial compliance with the requirement. The record shows that although the Claimant and Employer/Carrier were in negotiation, the Claimant failed to reach settlement with the Employer/Carrier under Section 8(i).

The record clearly shows that the Claimant signed a release and settlement was approved by a state judge as to a third party claim that is related to the Claimant's Longshore claim.

Although the record does show that the parties contemplated a settlement of all claims, and the carrier was placed on notice of the pending third party settlement, the Claimant breached his duty under 33(g) when he signed the release without obtaining the required consent.

Nor has Claimant alleged any compelling facts or circumstances to justify special dispensation for having failed to comply with the requirement. Rather, the record reflects that Mr. Bohannon, Claimant's attorney in his third party action, made a critical misrepresentation to

the severe detriment of his client. In his February 4, 2003 correspondence to Mr. Perry, Mr. Bohannon stated that "worker's compensation had made an offer which included waiver of their lien and that Claimant had accepted this offer." There is no evidence of record to demonstrate that such was the case. While it appears that an offer existed at this time, it is clear that a crucial term of the offer involved, as Ms. Torron-Bautista articulated in her February 11, 2003 letter, Claimant's longshore matter. As is further evidenced by this correspondence, a crucial aspect of the offer, which it seems Mr. Bohannon chose to ignore, was approbation from Mr. Barnett, Claimant's longshore attorney. Thus, Mr. Bohannon's February 10, 2003 correspondence to ALMA in which he enclosed an "Approval of Compromise of Third Person Cause of Action" to be signed and returned represents a continuation of the critical misrepresentation that he had unilateral authority to accept the offer. Moreover, the record does not conclusively demonstrate that ALMA ever signed the "Approval of Compromise of Third Person Cause of Action" as it was never offered into evidence. The record does reflect, however, that Ms. Torron-Bautista only became aware that Claimant had entered into the Release of All Claims with third party defendant FTS when she received her copy of the March 27, 2003 Order of Dismissal.

Claimant relies on the deposition testimony of Lydia Corbin, adjuster for FARA, to prove that other agents of the Carrier were aware of and agreed to the settlement with FTS. However, I do not accept that the deposition testimony supports a conclusion that Carrier was on notice of the settlement or provided written approval it. In fact, all that Claimant proves is that, based on a review of the documents, which included the March 6, 2003 Stipulation for Dismissal and the March 17, 2003 Order of Dismissal, Carrier was "well aware that Claimant settled his third-party case against Florida Transportation Services." Anyone reviewing those documents after the fact, however, would be aware that Claimant settled his third-party case with FTS. The critical issue, which Claimant has failed to prove, is whether Carrier was aware of and agreed to the settlement before these documents went into effect.

Waiver or estoppel, can not be applied to prevent Employer/Carrier from asserting a Section 33(g) defense due its post-settlement actions. No cases arising under the Longshore Act address it.[2] It appears that the state courts of Florida have established an exception that may permit the application of waiver or estoppel to extend insurance coverage where insurers assume the defense of a claim with the actual or presumed knowledge that they would have been permitted to deny coverage.[3] However, Florida law is not precedential or instructive in this situation.

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[2] In this regard, I note that the Claimant failed to cite any cases arising under the Act or otherwise that address this issue. I further note that the reason no cases under the Act address this issue is likely because the law is well-settled that equitable principles do not alleviate the written approval requirement under Section 33(g).

[3] In ***Florida Municipal Trust Insurance Trust v. Village of Golf***, 850 So.2d 544 (Fla. 4th DCA, 2003) ("Village of Golf"), however, the District Court of Appeal of Florida, Fourth District, articulated certain principles that have been established throughout Florida caselaw regarding an analogous issue. In Village of Golf, the issue on appeal was "whether this case is controlled by the general rule that insurance coverage cannot be extended by waiver or estoppel or the exception to that rule that, when an insurance company assumes the defense of an action with knowledge of the lack of coverage, it may be estopped to raise the coverage defense." Id. at 546. The court elaborated that, "[a]dmittedly, the general rule is that the doctrines of waiver and estoppel will not operate to create coverage in an insurance policy where none originally existed. ***Six L's Packing v. Florida Farm Bureau Mutual Insurance Co.***, 268 So.2d 560 (Fla. 4th DCA 1972), cert. discharged, 276 So.2d 37 (Fla.1973)." The court also observed that "[t]here is an exception to the rule, however, which provides that 'when an insurance company assumes the defense of an action, with knowledge, actual or presumed, of facts which would have permitted it to deny coverage, it may be estopped from subsequently raising the defense of non-coverage.' ***City of Carter Lake v.***

Moreover, I find that Claimant has not proven sufficient post-settlement actions on the part of the Employer/Carrier to demonstrate approval of the third party settlement. Claimant asserts three main post-settlement actions in this regard: (1) The Employer/Carrier authorized medical treatment for Claimant post-settlement; (2) It took Employer/Carrier six weeks to file an LS-207 denying Claimant's right to compensation under Section 33(g); and (3) Employer/Carrier made payments to Claimant post-settlement in excess of $22,000. I conclude that none of these post-settlement actions in and of themselves, nor taken together, demonstrate approval of the third party settlement for the reasons stated below.

First, it appears that the authorization which allowed for Claimant's post-settlement medical visit was actually pre-settlement authorization that only came to fruition in May, 2003. On February 7, 2003, Kay Martin, a nurse at FARA, cancelled Claimant's appointment with the physician due to "settlement posturing." (Corbin Deposition at 10:10). The appointment was later re-scheduled for March 7, 2003. It appears that Claimant never appeared at this appointment because, as Corbin testified, "he was scheduled to see Dr. Berkowitz on April 21st but was a no show *again*." (Deposition at 24:13). (*emphasis added*). Finally, Corbin testified that, while Claimant ultimately saw the physician in May, 2003, it appears that initial authorization was given for this visit in March 2003. (Deposition at 24-25). Thus, it appears that initial authorization was provided for Claimant's medical visits before he entered into the settlement and that, because he kept failing to appear at the appointments, the initial authorization was simply used to re-schedule appointments post-settlement until Claimant finally attended his appointment in May, 2003. Contrary to demonstrating post-settlement approval, the scheduling of the May, 2003 physician appointment most likely demonstrates an administrative oversight on the part of FARA.

Second, the fact that it took Employer/Carrier six weeks to file an LS-207 denying Claimant's right to compensation is not an especially egregious delay given that Ms. Torron-Bautista claims to have only become aware of the settlement when she received her copy of the March 27, 2003 Order of Dismissal. It is unknown how many days or weeks transpired after the issuance of the Order of Dismissal before Ms. Torron-Bautista received notification.

Finally, as Ms. Torron-Bautista made clear, I accept that the payments made to Claimant in excess of twenty two thousand dollars ($22,000) represented monies that Employer/Carrier admitted it owed the Claimant from the termination of benefits in 2002 through the Claimant's entry into a lump sum settlement in the third party action in March 2003. This shows that Employer/Carrier abdicated responsibility specifically for any benefits ensuing after the third party action for which Claimant failed to obtain prior written approval.

FINDINGS

Based on a complete review of the record, I render the following findings:

Aetna Casualty and Surety Co., 604 F.2d 1052, 1059 (8th Cir. 1979). Accord, ***Pacific Indemnity Co. v. Acel Delivery Service, Inc***., 485 F.2d 1169 (5th Cir. 1973), *cert. denied*, 415 U.S. 921, 94 S.Ct. 1422, 39 L.Ed.2d 476 (1974***); Fidelity and Casualty Company of New York v. Riley***, 380 F.2d 153 (5th Cir. 1967); ***Insurance Company of North America v. National Steel Service Center, Inc***., 391 F.Supp. 512 (N.D.W.Va. 1975), aff'd 529 F.2d (4th Cir. 1976). See also: 7C J. Appleman, ***Insurance Law and Practice***, s 4692 (1979)."

Thus, while cases arising under the Longshore Act do not address this issue, it appears that Florida has established the general rule that waiver or estoppel may not be applied to extend insurance coverage in such situations, except where the insurer assumes the defense of a claim with the actual or presumed knowledge that it would otherwise have been permitted to deny coverage.

1. I have jurisdiction to hear this claim.
2. No material facts as to summary decision on Section 33(g) are in dispute.
3. The Claimant was injured in an accident on February 10, 1999.
4. The Employer/Carrier accepted the injury as compensable.
5. The Claimant also had a third party claim against another party.
6. The Employer/Carrier filed a Notice of Lien as well as placed the Claimant on notice that written approval is required by the Employer/Carrier prior to agreeing to any third party settlement; otherwise, the Employer/Carrier would terminate any future benefits.
7. The Claimant entered in a Release of All Claims against one of the third-party defendants for a gross amount of sixth thousand dollars ($60,000), and a net to claimant of $15,179.05 which is significantly less that the benefits that have and would be paid on this claim and less than the value of the EmployerlCarrier Longshore lien.
8. The Claimant entered into a stipulation of settlement that was approved by a state court of general jurisdiction.
9. The Claimant did not obtain the required written approval from the Employer/Carrier for the settlement of the third party claim against Florida Transportation Services.
10. Claimant's failure to obtain written approval from Employer/Carrier prior to entering into a Release of all Claims with third-party defendant terminates Claimant's right to compensation from Employer/Carrier pursuant to Section 33(g) of the Act.
11. Any acts taken by the Employer/Carrier post settlement function do not invoke an implied waiver of its right to terminate benefits pursuant to Section 33(g).

ORDER

The Employer/Carrier is entitled to summary decision.

SO ORDERED

A

DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE